KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D.C. 20036

(202) 955-9600

FACSIMILE

(202) 955-9792

www.kelleydrye.com

DIRECT LINE: (202) 955-9888

EMAIL: jheitmann@kelleydrye.com

NEW YORK, NY

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January 10, 2003

Ms. Michelle Carey, Chief
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Ex Parte***
CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Carey:

On behalf of NuVox, SNiP LiNK, Xspedius, and KMC Telecom, I am writing to provide further information for the Commission's consideration in the above-referenced dockets regarding access to EELs. Specifically, I am writing to propose a modified version of the "restriction", "constraint" or "gating mechanism" that ALTS, NuVox, SNiP LiNK and Xspedius proposed previously.[1]

If the Commission is inclined to adopt some sort of restriction on conversions (despite an apparent consensus that the current "interim" restrictions have imposed burdens unintended and greater than any benefit gained) or on EELs more generally (despite the fact that CLECs have had unrestricted access to EELs in more than 10 states, including in Georgia and Texas[2] for years with no dramatic consequences to the ILECs in those states), we believe that the test proposed herein provides a manageable framework that serves the goal of denying access to EELs where

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1 ALTS, NuVox, SNiP LiNK, Xspedius *Ex Parte,* WC Docket Nos. 01-338, 96-98, 98-147 (Dec. 13, 2002).

2 Unrestricted EELs have been available in all 5 SBC/Southwestern Bell -region states via the "2A" interconnection agreements, and in six BellSouth states via interconnection agreements, state commission decisions, and in Density Zone 1 of the Top 50 MSAs where ILECs have elected to avail themselves of the circuit switching carve-out by making new EELs available (*e.g.,* all BellSouth markets in the Top 50 MSAs, including Atlanta, Miami, Charlotte, Nashville, New Orleans and others).

the Commission might determine that no impairment exists (*i.e.*, in the interexchange services market), while promoting competition for local voice and data and broadband Internet access services and limiting opportunity for ILEC and IXC gaming. Notably, our framework continues to include a bright-line standard that has been revised to eliminate the need for audits, if certain precertification criteria are met, while otherwise preserving the potential for an ILEC audit in circumstances where such measures are not met.

The modified framework we propose here is intended to benefit a broad group of CLECs rather than one specific business plan or technology. It is intended to allow CLECs to use EELs to compete directly with the Bells and other ILECs in the provision of "local exchange company" services that the Bells have traditionally offered and for which they do not need 271 authority or a 272 affiliate to do so. Accordingly, our proposal (1) denies access to carriers seeking to use EELs exclusively for long distance/interexchange service, including not only long distance voice services but also long distance data services (*e.g.*, interexchange frame relay), and (2) allows access for the provision of bundled service offerings that may include local voice, local data, Internet access, exchange access and interexchange services (but not exclusively interexchange services).

Notably, our proposal includes no local voice requirement. The Bells have never had one and continue to compete without one. When CLECs compete, CLECs need the same flexibility as they have to offer T1 products that include "a full T" of Internet access or a full T of point-to-point local data transmission. The Bells have always provided these Internet access and local data services as "local exchange carriers" (without having to impute special access costs in their provision); CLECs have, in some circumstances, been able to do the same under the Commissions existing rules (Safe Harbor Option 1, in particular)[3]; and, in order to compete effectively, CLECs need to be able to continue to do so (without an "exclusive" or "primary" provider restriction which the Bells themselves are not saddled with).

Similarly, and most importantly, CLECs need to continue to be able to use EELs to provision their "integrated T1" product offerings over which they provide a bundle of services that typically include local voice, Internet access, and exchange access (long distance service is also offered in conjunction with exchange access). CLECs such as NuVox, SNiP LiNK and Xspedius have introduced the integrated T1 product to a market hungry for broadband and advanced telecommunications solutions at affordable prices. Facing no competition, the Bells had ignored this market for years, as they essentially trapped these customers into a variety of more expensive narrowband product offerings. Notably, CLECs have brought this product

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[3] Under safe harbor option 1, a carrier may dedicate an entire T1 of bandwidth to data and/or Internet access, so long as it serves as the end user's exclusive local service provider. In such instances, voice services may be provided on a parallel DS0 EEL or T1 EEL.

"down market" and, as a result, frequently deliver broadband to customers who never before had access to it.

It is only because of this UNE-based competition that the Bells recently have begun to roll-out their own integrated T1 bundled service offerings. Notably, these offerings are not subject to FCC-imposed "significant local use" constraints. ILECs are free to offer any mix of local voice, local data, Internet access, exchange access and long distance over such circuits – or they may devote the entire circuit to local data or Internet access (which the BOCs have long provided with no help from their 271/272 long distance affiliates). In states where CLECs have had access to new EELs (either per state order or per the circuit switching exemption), such access typically has been unrestricted and CLECs have enjoyed the freedom to be able to offer attractive broadband data and Internet access solutions to customers at reasonable prices. As Cbeyond noted in its December 16, 2002 *ex parte*, new EELs result in new wholesale revenues for the ILECs and not the displacement of legacy special access revenues associated with the traditional long distance business.[4]

If the Commission feels the need to adopt some restriction or gating mechanism, it must ensure and not curb the continued development of this important form of facilities/UNE-based innovation and broadband competition. In doing so, it is important that the Commission avoid placing upon CLECs burdens not faced by the Bells and other ILECs. As indicated above, CLECs can compete successfully only if they can use EELs in the same manner as the ILECs. Moreover, the broadest group of CLECs will be left behind, if the Commission's rules are inadvertently tailored to the particular business plan and technology of one facilities-based CLEC, rather than many. As we discuss below, we fear that may be the consequence if the Commission were to adopt the most recent proposal offered by Cbeyond.[5]

Prior to January 6, 2003, our advocacy and Cbeyond's had been very much in accord. We note, however, that in its January 6, 2003 *ex parte* Cbeyond submitted its latest alternative proposal that includes a brand new requirement of providing "primary local exchange service" and certain unnecessarily complex and burdensome evidentiary requirements by which a carrier could indicate compliance with that criterion. While we give credit to Cbeyond for its attempt to craft an improvement over the existing safe harbor regime, for the reasons discussed below we believe the particular plan Cbeyond has introduced in its January 6 filing is inherently too restrictive in large part because it is born out of a specific technology and business plan unique to Cbeyond.

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4 Cbeyond *Ex Parte,* WC Docket Nos. 01-338, 96-98, 98-147 (Dec. 16, 2002).

5 Cbeyond *Ex Parte,* WC Docket Nos. 01-338, 96-98, 98-147 (Jan. 6, 2003).

Cbeyond, like NuVox, SNiP LiNK, Xspedius, KMC and other CLECs, depends heavily on the integrated T1 product offering. As is true to varying degrees with the others, Cbeyond sometimes serves mid size customers (or meets the growing needs of its smaller customers) with a "parallel" or second T1. Often, customer growth is generated by Internet access and data transmission needs. Accordingly, in these situations the second T1 is often dedicated to providing a full T1 of bandwidth to the customer. As we understand it, Cbeyond's technology puts it in the relatively unique position of being able to "meld" the bandwidth of two T1s together. Thus, making a commitment to provide local voice services on all EELs is less of an issue for Cbeyond, as it can technically apportion voice traffic to each of the circuits that have been melded, while still offering its customers a full T1 (or more) worth of Internet access. Moreover, Cbeyond's business plan (as we understand it) does not contemplate the sale of competitive local data and Internet access products that may be made available to end users without demanding that they give up their familiar ILEC voice service. This, too, makes Cbeyond different from many CLECs and, for that reason, makes it easier for Cbeyond to cede that opportunity to compete head-on with the ILECs by including a local voice requirement in its EELs test.

Critically, Cbeyond's suggestion that CLECs should have to provide local voice services, assign numbers and provide 911 on EEL lines ignores the fact that these are all things that the Bells do not have to do when offering competing T1 products. While each component of Cbeyond's recalibrated "primary local exchange service" standard would certainly provide indication that the CLEC is in fact competing directly with the ILEC and not using the circuits exclusively for long distance services, by apparently making each component a requirement, Cbeyond's proposal does far more than it needs to. In so doing, it is likely to have many of the same unintended consequences that have plagued the current "interim" restrictions.

By introducing the brand new concept of "primary" local exchange service or even "primary" local exchange carrier (a logical but troublesome extension of the standard proposed by Cbeyond), Cbeyond enters uncharted and dangerous waters.[6] Although intended to create a bright line, we fear that Cbeyond's proposal creates new and fertile ground for ILEC mischief. The Commission ought not start a debate about what "primary" means now or encourage a debate that will inevitably be played out in enforcement proceedings before it or state commissions. Like the measurement and sole provider criteria it is intended to replace,

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[6] We also fear that such a proposal will lead CLECs back into the stormy seas that prevail currently. Although Cbeyond clearly defines "primary" in a manner so as to avoid measurement issues (and we appreciate Cbeyond's doing so), we fear that use of the term will nevertheless invite measurement oriented squabbles and end user policing issues of the type that have plagued all three of the current safe harbors.

Cbeyond's business plan and technology specific proposal invites myriad proof and compliance issues that will inevitably retard innovation and encumber CLECs' ability to compete head-on with the ILECs and deliver local and broadband services to consumers.

NuVox, SNiP LiNK, and Xspedius believe that the following proposal presents a better alternative that will benefit a broader group of CLECs and consumers. The proposal incorporates some aspects of Cbeyond's proposal – and even aspects of a proposal made by Qwest – into a modified proposal that seeks to address the desire for a bright-line rule that eliminates or alleviates the potential for resource consuming audits. The proposal builds on the standard initially proposed on November 14, 2002 by ALTS and includes a presumption of compliance that can be assured either through pre-certification that certain indicia of compliance are met or through post-certification audits in the absence of pre-certification.

Given competitive carriers' disappointing experience with the waiver opportunity associated with the current constraints, NuVox, SNiP LiNK, Xspedius, and KMC Telecom do not at this time choose to expressly incorporate the waiver procedure previously endorsed by Cbeyond into our proposal. By offering a menu of indicia of compliance (to which we invite others to propose reasonable additions), rather than affirmative requirements that have the potential to force CLECs to jump through a series of hoops not contemplated by their business plans, provisioning and sales methods, technology or network architecture, coupled with the option of foregoing pre-certification of compliance in favor of post-conversion, verification via limited, probable cause-based audits, we hope to eliminate the need for waiver applications (although we by no means mean to proscribe any CLEC's right to file one).

Thus, in the event that the Commission determines that the record supports adoption of new constraints applicable to converted EEL circuits or even new EELs, NuVox, SNiP LiNK, Xspedius and KMC Telecom propose the following bright-line constraint:

> **A requesting carrier may not convert SPA circuits to EELs if such circuits are used to serve a customer for which the requesting carrier provides no local voice or local data or Internet access services in competition with the ILEC.**
>
> Compliance with this constraint can be verified via limited post-provisioning probable cause-based audits or, at the CLEC's option, by pre-certification that at least two of the following compliance indicia are met:
>
> - the circuit is connected to a collocation in an ILEC end office; or
> - the CLEC has active local interconnection trunks with the ILEC in the LATA; or
> - the CLEC offers local voice, local data and/or Internet access in the LATA; or
> - the CLEC assigns a local telephone number associated with the circuit; or

- the circuit is not served by a switch that is used exclusively to provide long distance service.

An ILEC may file an enforcement action at the FCC or state commission, if it has reason to believe that the CLEC has falsely pre-certified compliance or that it no longer remains in compliance with the bright-line rule set forth above.

At a CLEC's option, it may opt not to pre-certify compliance with any of the above indicia and instead accept that an ILEC may audit its compliance with the bright-line rule set forth above. Such audits must (a) be triggered by a probable cause standard – a demonstrable and rationally related concern regarding compliance – no random or routine audits; (b) be conducted by an AICPA-compliant independent third party auditor acceptable to both parties; (c) not require burdensome production or record keeping; (d) be limited to once in a twelve month period - barring finding of more than de minimis (>10%) non-compliance (which would justify a one audit per six month period standard until an audit uncovered no more than de minimis (>10%) non-compliance); (e) be paid for by the ILEC – with cost shifting on a pro-rata basis, if certain circuits are found to be ineligible; (f) be subject to state PUC or FCC review prior to any true-up or switch to SPA rates.

NuVox, SNiP LiNK, Xspedius, and KMC Telecom hope that this revised proposal advances the debate on this issue and offers the Commission a well reasoned and legally defensible solution, should it identify a need to constrain access to EELs in any way. We acknowledge that our proposal provides no absolute guarantee against gaming by either ILECs or IXCs. We can think of no test that will eliminate all possibilities of gaming and any need for enforcement activity. However, the Enforcement Bureau remains charged with ensuring compliance with the Commission's rules. Please do not hesitate to contact me, if I can provide additional explanation or responses to additional questions or concerns.

Respectfully submitted,

John J. Heitmann

JJH:cpa

cc: Tom Navin
Jeremy Miller
Julie Veach
Mike Engel
Qualex